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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 119.

GEORGINE ISELIN, Appellant,

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR THE APPELLANT.

The argument of the Government in its brief may fairly be summarized as contending:

(1) That Section 800(a) was intended to apply to the sales in question;

(2) That the statute is applicable thereto; and

(3) That Congress, having reenacted the statute after its construction by the Treasury Department and others, must be held to have adopted such construction.

The first two contentions are covered by our main brief, but some of the arguments now advanced by the Government to support them require reply.

The third contention was not discussed in our original brief and is therefore replied to here.

ARGUMENT.

I.

No Legislative Intent to Tax the Sale of Leased Boxes Can Be Discovered.

There has been a labored effort from the beginning of this case to discover a legislative intent to tax the transactions in question.

Whether we take the argument of the Government in the Court of Claims, the decision of the Court of Claims, or the brief of the Government in this Court, we think it clearly appears that the tax imposed in this case is sought to be sustained upon two theories, namely: First, upon the ground that the intent to tax the sales in question is found in the terms of the statute; and, Second, upon the ground that such intent is found in considerations outside of the statute.

The two theories are widely divergent. It is the failure to recognize the distinction between the two, which has resulted in the errors complained of.

If the statute is plain, clear and unambiguous, it is the function of the courts to apply it as it reads and to give effect to the legislative intent clearly expressed. In such case there is no room for construction.

If the statute is ambiguous and its application cannot be determined from its terms, it is necessary to indulge in construction. A construction of the statute requires that the legislative intent be discovered. This, for the obvious reason that the intent does not appear in the statute itself.

As we have previously pointed out, both the Govern-

ment, in its several briefs, and the Court of Claims, have failed to give any consideration to the question as to whether the statute is open to construction. The statute by its terms imposed no tax upon the transaction in question. No inquiry was made as to whether this was a clear and plain omission or whether it was the result of ambiguity and uncertainty in the terms of the statute. Having discovered the omission, the Court of Claims proceeded to supply it by construction, as contended for by the Government. To support this procedure, it was asserted that Congress intended to impose the tax.

The error consists in confusing "omission" with "ambiguity". The fact that certain sales are clearly omitted from the statute, does not establish that the statute is ambiguous and requires construction. If a statute, as here, clearly enumerates certain ticket sales and prescribes that they shall be subject to specific taxes, but omits sales of a different class of admissions to which none of the taxes imposed can be applied, it does not follow that the statute is ambiguous and open to construction. The statute is still plain and clear.

This Court, as pointed out in Title V of our main brief, has repeatedly held that such omissions do not render a statute ambiguous, and that statutes levying taxes will not be extended or enlarged by construction to include them.

In short, as demonstrated in our main brief, the statute is plain, clear and unambiguous, imposes no tax upon the sales in question and is not open to construction. Inasmuch, however, as the Government renews its contention here with respect to the legislative intent, both upon the face of the statute and outside of it, we shall reply thereto.

The Alleged Intent Does Not Appear in the Terms of the Act.

The omission by Congress to enumerate the sales of the right to use stockholders' boxes and to provide a method of taxing such sales is the sole ground advanced by the Court of Claims as a justification for the construction which it indulges. In its opinion at Record, p. 33, the Court says:

> "It was not assumed that such persons would sell tickets for these boxes."

It is scarcely logical to proceed from this premise to a conclusion that Congress intended to tax such sales, but the Government argued for it and the court has reached it. In reaching such conclusion the Court of Claims, in complete contradiction of its opinon that Congress "assumed that such persons would not sell tickets for such boxes", says that:

> "The intent and purpose of Congress was to impose a tax in just such a case" (Record, p. 34).

As to just where this intent is to be found, the court does not say, but the opinion, with like inconsistency, further indicates that the court considered that such intent was found within the language of the statute. The court says (Record, p. 33):

> "When Congress enacted Paragraph (5) of the statute, the evident purpose was to reach by a larger tax persons who were able to have the permanent use of boxes in an opera house, or who had a lease for such boxes."

A larger tax than that imposed upon what? The statute will be searched in vain for the answer to this question. No such purpose is evidenced in the words of the statute or elsewhere. In fact, the contrary plainly appears. If by

this statement the court merely meant that a licensed box similar to a box which was sold for $60 should pay a greater tax than a one dollar admission ticket, the statement is correct. But the tax is an *ad valorem* tax.

Under Paragraph (1) all paid admissions are taxed at the rate of 10%. If the paid admission is $1, the tax is 10 cents. If the paid admission is $60, the tax is $6. Under Paragraph (5) the tax is 10% of the price at which similar accommodations are sold. If a similar accommodation sells for $1, the tax upon a leased box is 10 cents. If a similar accommodation sells for $60, the tax upon a leased box is $6. The tax imposed upon leased boxes is upon an exact parity with the tax imposed upon general admissions. The same percentage is applied to each of the two classes.

Again the Court of Claims says:

> "Manifestly, it was the intent and purpose of Congress that if tickets were sold for more than $.50 in excess of the established price, plus the amount of tax imposed under Paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess should be imposed" (Record, p. 33).

This was undoubtedly the intent with respect to certain tickets. What tickets? The tickets described in Paragraph (3), and only the tickets for which such excess tax is therein prescribed. These are tickets having an established price at the ticket office and paying a tax under Paragraph (1). Neither of these characteristics pertains to permanently used or leased boxes described in the text under Paragraph (5), and there is nothing in the language of the statute to show that permanently used or leased boxes were intended to be covered by Paragraph (3).

If by a "larger tax" the Court of Claims meant that Congress intended to tax licensed boxes at a higher rate or to impose upon them an excess tax not paid upon other admissions, it may likewise be said that no such intent is to be found within the language of the statute. No provision imposing such a tax or expressing such intent is contained therein.

And we may well inquire at this point as to why any such intent should be presumed. What is there in the nature of a parterre box, or the circumstances under which it is held, which would warrant any such burden of taxation?

The production of grand opera is possible only through the means of philanthropic subsidies. The appellant's license rests upon a contribution to that subsidy through an original investment in the Metropolitan Company of $30,000, upon which there was no hope or expectation of receiving a return. The Company has never realized any profit, and has never distributed any profits to its stockholders (Record, p. 29).

In addition, the appellant has obligated herself to an annual assessment of $4,500 for the purpose of subsidizing the producing company. It is this original investment and this annual subsidy which make it possible to sell the "similar accommodations" at $60 per box and the other accommodations in the opera house at the lower prices charged to the general public.

Being under such burden of great expense for the benefit of all others who attend the opera, why should Congress desire to add to such burden by imposing "a larger tax" upon the appellant than assessed against those enjoying privileges most nearly resembling hers?

The Alleged Intent Cannot Be Discovered in Considerations Extraneous to the Statute.

To the Government it appears that Congress was confronted with the urgent necessity of supplying enormous revenues, and, casting about for objects of legitimate excess tax, determined to levy a tax upon amusement admissions, and to exact a higher tax for all admissions disposed of at excess prices.

It is then argued that with such purpose in view, the dictates of reason and common sense are violated if Paragraph (3) is not held to impose a tax upon appellant's sales.

To establish the general purpose as contended, the usual course would have been to expound its scope, view the situation dealt with, and invoke the aid of the Congressional Record and Committee Reports. This the Government is content to omit.

Supplying the omission, we find the argument to be without support.

In the first place, millions of people were patronizing places of amusement. By compelling them to pay a tax of 10% upon the price of admissions, a very considerable income would result to the Government.

In the second place, the practice of purchasing tickets to places of amusement and reselling them at prices in advance of the ticket office price was notorious. This practice was in ill repute in the public mind, and it seemed expedient to Congress to require persons indulging therein to contribute to the Government for revenue purposes half of the excess prices realized. This tax was provided for in Paragraph (3). Chairman Kitchin, of the House, Ways & Means Committee, which framed the Bill (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 661), in presenting it

to the House, made the following comments (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 696):

> "Title VIII is the tax on admissions to places of amusement, etc. . . . We have also entered a provision catching what they call the theater ticket scalper, the man who sells theater tickets at the news stands of hotels for the theaters in his city."

Evidence was taken by the Senate Finance Committee in its hearing on the Bill covering the question of "scalpers" (Finance Committee Hearings, 1918, p. 206).

There were other classes of admissions which Congress evidently thought should be subjected to a tax: free admissions for which a tax was provided under Paragraph (2); admissions disposed of by proprietors, managers or employees, for which a tax was imposed under Paragraph (4); and amusements afforded in conjunction with refreshments, the prices of which could not be definitely separated from the refreshment price, for which a tax was imposed under Paragraph (6).

There were admissions to theaters and operas enjoyed by persons who had the permanent use of, or who leased, theater accommodations. These privileges had no established price or value, and a special provision was made for them in Paragraph (5). As to this class of admissions, there is nothing in the Committee Report, in the Congressional Debates, or in the field of common knowledge, evidencing a general practice anywhere to sell or transfer the license to use such amusement privileges as was the case of the ticket scalper.

Counsel for the Government appear to proceed upon the theory that appellant's income from the sales in question escapes taxation. Such is not the case.

As previously pointed out, appellant's license rests upon an original investment of $30,000 and is contingent upon the payment of an annual assessment of $4,500. The Court of Claims is of the opinion that it was not assumed by Congress that such persons would sublet their privileges of admission. If that be the reason no tax was imposed in connection with such subletting, well and good. But such assumption on the part of Congress is no justification for amending the statute by the courts.

We submit, however, that a more persuasive reason for omitting a tax upon such sales under Section 800 (a) is that Congress assumed that persons enjoying such privileges in return for an investment of $30,000 and the payment of an annual assessment of $4,500 were of a class whose income would fall within the major brackets of the income tax provisions of the Revenue Act of 1918, and that any income received from the sale of their parterre box privileges would pay a tax thereunder. Certain it is, that the $9,525 realized by the appellant was so taxable.

With respect to the ticket scalper, for which special provision was made, no such assumption is possible. The standard prices of theater tickets in New York are $3 to $5. The scalper purchases tickets at these prices. He resells them at an advance of $.50, $1, or more, as explained by Chairman Kitchin upon the floor of the House (Cong. Rec., 65th Cong., 2nd Sess., Vol. 56, Part XII, p. 696). Obviously the scalper must sell thousands of these tickets before he is subjected to any income tax, and unless special provision were made therefor, the profits realized by him might escape taxation entirely.

A Congressional intent to tax the sale of the right to use stockholders' boxes is not found in the language of the statute. Considerations extraneous to the statute clearly

demonstrate that no such intent in fact existed, to be called into play were the statute ambiguous.

On the contrary, there is in the statute a careful enumeration of admissions and sales thereof subject to tax, and a studied method of applying the tax to each. Sales of the right to use stockholders' boxes are omitted. Furthermore, considerations extraneous to the statute disclose cogent reasons for omitting to tax such sales.

II.

The Statute Is Not Applicable to the Sales in Question.

In our main brief we pointed out that the statute could not be applied to the sales in question because its terms were wholly inapt and inappropriate (Point IV, p. 23).

The Government has advanced several arguments to establish that the statute is applicable, to which we make reply here.

The "Resale" Argument.

It is apparently fully appreciated that Paragraph (1) of the Act imposes a tax upon initial sales, and that Paragraph (3) imposes a tax upon resales. Without argument, the Government characterizes the sales in question as "resales" and proceeds to the conclusion that there can be no reason for refusing to apply the tax to such resales.

In addition to the fact that the statute, by its terms, is not applicable, this contention suggests another and conclusive argument. The sales in question were not resales. They were initial sales. The appellant was entitled to the occupancy of her box as one of the stockholders of the com-

pany, and not by any transaction of sale and purchase. Because it was not a sale, and therefore not taxable under Paragraph (1) of the Act, Congress provided a special tax under Paragraph (5). When appellant sold the right to occupy her box, such sale was an initial sale, not a resale. Since it was not a resale, such as that covered by Paragraph (3), it was not taxable thereunder.

The "Exemption" Argument.

It is argued that the statute is applicable because no exemption can be established under the principles of law governing exemptions.

The claim advanced by the appellant that Paragraph (3) did not apply to the sales made by her is distorted by the Government into a claim that the sales are "exempted" from taxation.

To support this, cases are cited with respect to the law applying to "exemptions". When a corporation is created, as in one of the cases cited, with a provision in its charter limiting the taxes that may be imposed upon it which exempts it from taxes applicable to other corporations, the question presented as to the scope and effect of such exemption is quite different from the question presented here. To impose a tax upon certain property, and to exempt certain classes of property otherwise included within the general scope of the Act is one thing. To impose a tax upon certain enumerated transactions, without including other transactions, is quite another thing.

We do not claim that the appellant's sales are exempted from taxation, but we do claim that no tax was ever imposed. The argument advanced and the cases cited are beside the point.

The Computation of the Tax.

In our main brief, Point IV, page 23, we demonstrated by a computation of the tax, that Paragraph (3) of the statute was wholly inapplicable. In reply to this, the Government seizes upon the inequality resulting from the lack of any credit to the appellant on the tax imposed by Paragraph (1), and argues that the appellant computed her own tax and cannot be heard to complain.

The point made seems to be that while the appellant could not claim any credit for a paragraph (1) tax, because none was due from her, nevertheless, she might have claimed credit for the Paragraph (5) tax which she had paid. It is argued that while the statute literally would not permit of this, it would be equitable for appellant to have made the deduction, and the Government would be satisfied if this Court should construe the statute equitably to permit it.

This argument merely calls for a further unwarranted construction of the statute and emphasizes the point made by us that the statute is wholly inapplicable and requires judicial revision in order to sustain the tax imposed.

It is further sought to shift the burden of the computation of the tax to the appellant. The answer to this contention is included in the reply to the claim that appellant is bound by her original tax return under Paragraph (5), which is discussed under the next sub-heading.

Admissions Against Interest.

The inapplicability of the statute and the injustice imposed upon the appellant by the decision of the Court of Claims is forcibly demonstrated by an examination of the contention that the existing situation results from the fact

that appellant made a return and paid a tax under Paragraph (5) without protest.

It should be noted that Regulations 43 required appellant to pay a tax under Paragraph (5) and prescribed the minimum basis of the tax as the established price of the grand tier boxes (Appellant's Brief, page 7).

Paragraph (5) required the payment of a tax upon leased boxes upon the basis of the established price of similar accommodations. Here there were no similar accommodations, and the Court of Claims has so found. The Department regulations held that the grand tier boxes were most nearly similar and therefore established a minimum basis for the tax. No other basis for computing the tax was or is discoverable, and appellant had no choice but to comply with the regulation. This she did without protest or objection and consented to pay the tax, notwithstanding the doubtful validity of the ruling.

At the time this was done there was pending a request for a ruling as to the liability of appellant and others under Paragraph (3). When the ruling was issued, it was to the effect that the appellant should pay the tax under Paragraph (3). The ruling prescribed that "The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by Article 17 of the enclosed regulations and the price for which the ticket is sold" (Government Brief, p. 6).

Regulation 17 contains the following:

> "The person in control has, of course, the power to fix the price to be actually charged for admission. He has, therefore, the power to determine the established price. But as the established price is a matter

> of substance, not of name, the mere fact that he calls a price the 'established price' does not make it such. Nor does the price he decides to charge for a particular admission necessarily establish the price for that admission. If he arbitrarily sets different prices on admissions, under similar circumstances, to accommodations in all substantial respects similar, these different prices will not be the established prices of the respective admissions for which they are charged, but the highest price among them will be the established price of all such admissions."

It would seem, under this regulation, that the established price of the seats in question, if there can be said to have been any established price, was the price at which appellant sold the admissions. Although the regulations in question were enclosed with the ruling, the ruling absolutely forbade appellant to take such sale prices as the established prices and compelled her to use as the established price, the price of box seats in the grand tier.

Had the actual sales price been taken as the established price, of course there would have been no tax payable, because the established price and the sales price would have been equal. What the Government did was to require appellant to pay a Paragraph (5) tax on the basis of the price of grand tier boxes. Having done so without protest, the Government now says: "Your right to occupy the box is an initial sale. Your sale of that right is a resale. Having complied with our regulations as to the Paragraph (5) tax without protest, you have established the price on your box on a minimum basis. You will now be compelled to use that minimum figure as the established price of your box and pay the maximum tax of 50% on the excess of the sales price over that figure."

When appellant comes to make a return of her taxes in compliance with this ruling, she finds in the statute no method of computing the same and no provision for a credit to her for taxes already paid, such as other persons taxed under Paragraph (3) enjoy; because she fails to construe the statute to read an unwarranted credit into it, and complies literally with the Department rulings, the Government now says she has computed her own tax and cannot avoid the consequences.

The whole argument is anamalous and serves again to conclusively demonstrate the fact that Paragraph (3) is inapplicable to the sale in question. The effort to apply it results in a forced construction of the statute and a gross injustice upon the appellant.

"Device" for Avoiding Tax.

It is intimated by the Government that the method of handling the stockholders' admissions is a "device" to avoid the payment of the tax. It is argued that the statute must be deemed to apply to the transactions in question "because Congress did not intend that the tax should be avoided through any arrangement between the proprietors of the place of amusement and those occupying such relations to the proprietors that they had the permanent use of boxes" (Government Brief, p. 8).

The certificate of organization of the Metropolitan Company was executed in 1893 (Record, pp. 6-7). The stockholders' agreement relating to the license to use designated boxes was made in 1893 (Record, p. 21). The lease in question was made in 1908 (Record, p. 7).

It was by these documents that the arrangement for the use of boxes by stockholders, their reservation from the

lease for the exclusive use of the Metropolitan Company, and their assignment to stockholders was made. This was accomplished many years prior to the enactment of the admissions tax law and can scarcely be considered as a "device" designed to evade the provisions of the statute.

III.

There Has Been No Departmental Construction of the Statute Having the Force and Effect of Law.

It was contended by the Government in the court below that Paragraph (3) of the statute has been construed by the Treasury Department as imposing a tax upon the sale of the right to use a stockholders' box, that the rulings of the Department have been affirmed by the Attorney General, and that such Departmental construction has the force and effect of law.

The contention is not made here. It is argued, however, that the re-enactment of the statute after such rulings has established the construction contended for. As the two propositions are inter-related it is necessary to examine both.

Two Department rulings and an opinion of the Attorney General are referred to:

The first ruling is that contained in Regulations 43, Revised, Article 25, sub-paragraph (6). This is the ruling set forth in our main brief herein at page 7. The ruling prescribed that stockholders' boxes were subject to a tax under Paragraph (5); that there were no similar boxes in the house, but that the minimum basis for the tax should

be the price of the boxes in the next tier, which were the most nearly similar.

The second ruling relied upon is that made by the Commissioner of Internal Revenue under date of December 24, 1919. In that ruling the Commissioner prescribed that stockholders, in addition to paying the tax under Paragraph (5), were required, upon the sale of the right to use their boxes, to pay a tax upon the proceeds of such sale under Paragraph (3); and that the basis for computing the tax should be the difference between the established price of boxes in the next tier and the sales price. This ruling appears at Record, p. 30, and is referred to in our main brief herein at page 8.

It is further contended that the ruling of the Commissioner was concurred in by the Attorney General under date of March 22, 1920 (32 Op. Atty. Gen. 142).

The argument of the Government is: (1) That the ruling contained in Regulations 43 prescribed the price at which similar accommodations were sold as the established price upon which to compute the tax upon appellant's box under Paragraph (5); (2) That it follows, therefore, that the same basis must be taken for computing the tax under Paragraph (3) and that the ruling of the Treasury Department under date of December 24, 1919 to that effect was correct; (3) That this construction was confirmed by the Attorney General in his opinion; (4) That such rulings have the force and effect of law and are binding upon the courts as a construction of the statute.

The facts in connection with these several rulings are important. They are as follows:

The several rulings referred to were made with specific reference to the tax now before the court and in the proceedings now being reviewed.

Appellant paid her tax under Paragraph (5) in accordance with Treasury Regulations 43 (Record, p. 30; Findings, par. XI).

Prior to the payment of such tax the Metropolitan Company had requested the Commissioner of Internal Revenue for a ruling with respect to the application of the Act to the sales of the right to use stockholders' boxes.

The Commissioner's ruling of December 24, 1919, to the effect that such sales were taxable under Paragraph (3), was in response to such request (Record, p. 30; Findings, par. XII).

On January 28, 1920, appellant paid her tax in compliance with the ruling of December 24, 1919. Such payment was made under protest. (Record, p. 30; Findings, par. XIV).

After such payment under protest, the Treasury Department requested a ruling of the Attorney General. The Attorney General's opinion was to the effect that the sale was subject to a tax, but did not clearly state whether the tax should be imposed under Paragraph (3) or Paragraph (4) (32 Op. Atty. Gen. 142).

On October 3, 1920, appellant filed her claim for a refund.

In rejecting such application for a refund, the Commissioner rendered a decision ruling that the tax was payable under the provisions of Paragraph (4) (Record, p. 31; Findings, par. XIV).

The Court of Claims has held that the sale is taxable under Paragraph (3).

The rule of law invoked is quite clear, though it is sometimes rather loosely stated in the cases. The earliest case cited, and almost invariably cited, to support the rule is

Edwards' Lessee v. *Darby,* 12 Wheat. 206. In that case the court said at p. 210:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

It thus appears at the outset, and no later case has effected any change in this respect, that the rule is a rule of statutory construction.

The same error persists in the argument of the Government here to which we called attention in our main brief and which is the error underlying the whole case. That error is the assumption that Paragraph (3) of the statute requires and is open to construction. The first answer to the contention of the Government, therefore, is that the rule can only be invoked in aid of construction and has no application where, as here, construction is not permissible.

This limitation to the rule was applied in *United States* v. *Graham,* 110 U. S. 219. The case concerned an Act of Congress passed in 1835. About a month thereafter, the Treasury Department construed the statute in circular instructions which it issued. The Navy Regulations adopted in 1865 accorded the same construction to the Act. From that time until 1883, when the case was decided, the construction had, with a single exception, been adhered to by the several Departments.

The court found, however, that the statute was so clear and explicit as not to be open to construction, and said at p. 221:

> "Such being the case, it matters not what the practice of the departments may have been or how

> long continued, for it can only be resorted to in aid of interpretation and 'it is not allowable to interpret what has no need of interpretation'. If there were ambiguity or doubt, then such practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards, Lessee* v. *Darby,* 12 Wheat. 206; *United States* v. *Temple,* 105 U. S. 97; *Swift & Co.* v. *United States,* 105 U. S. 691; *Ruggles* v. *Illinois,* 108 U. S. 526."

The limitation to the rule as thus expressed was applied in

> *Houghton* v. *Payne,* 194 U. S. 88, 99;
> *United States* v. *Johnson,* 173 U. S. 363, 378;
> *United States* v. *Alger,* 152 U. S. 384, 397;
> *United States* v. *Tanner,* 147 U. S. 661, 663.

The limitation is expressly stated in *National Lead Co.* v. *United States,* 252 U. S. 140, 145-146.

It has been definitely held that where a statute is plain and not open to construction the courts will restrict its application to its plain terms, notwithstanding an administrative construction to the contrary. This was the decision in *United States* v. *Field,* 255 U. S. 257, 262, where an administrative construction adopted by the Treasury Department was rejected.

There is a second limitation upon the rule, stated in *United States* v. *Finnell,* 185 U. S. 236, at p. 244, as follows:

> "Of course, if the Departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge."

This limitation is likewise supported in *Houghton* v. *Payne*, 194 U. S. 88, at p. 102, and *United States* v. *Graham*, 110 U. S. 219, 221.

A third limitation upon the rule was stated in 2 Lewis' Sutherland, Stat. Const. 890 (2d Ed.) to be as follows:

> "The Legislature is presumed to be cognizant of such construction [by those whose duty it is to execute a law], *and after long continuance*, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction."

A leading case stating the rule is *Pennoyer* v. *McConnaughy*, 140 U. S. 1. At p. 23 the court says:

> "The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

In the last named the rationale of the rule appears. It is a long continued policy with respect to the construction of the statute, relied upon by the Government and by those

affected by its provisions, and upon which property rights and methods of doing business have become established, which induces the courts, in a proper case for statutory construction, to give weight to the administrative ruling before completely overturning established rights and customs. *National Lead Co.* v. *United States,* 252 U. S. 140, 145-146.

The present case forcibly illustrates the soundness of this limitation. Here Department rulings have been made for the first time in the very proceedings preliminary to the present action. If the rulings made which compelled the payment of the contested tax by the appellant are final and conclusive and have the force and effect of law, the courts are completely ousted of jurisdiction. The mere statement of the facts completely refutes the contention of the Government.

It is even doubtful whether there has been any Departmental construction of the statute such as is entitled to respect from the courts within even the general statement of the rule.

The Commissioner of Internal Revenue instructed the claimant to pay under the provisions of Paragraph (3). The matter was submitted to the Attorney General and he ruled that the sales were taxable, mentioning both Paragraph (3) and Paragraph (4) and not indicating definitely which should be applied. The Commissioner, in rejecting the claimant's claim for a refund, ruled that the sales were taxable under Paragraph (4).

It is clear that both sections do not apply. There has been no definite ruling by the Department as to which does apply.

It is submitted that since Paragraph (3) of the statute is not open to construction, Departmental rulings cannot

be invoked in aid of its construction; that either of the inconsistent rulings of the Department is clearly wrong, and therefore not available under the rule in aid of construction; that there has been no Departmental ruling continued in effect for such length of time as to bring it within the provisions of the rule invoked; that the rule has no application to an initial Departmental construction in the proceeding brought before the court for review; and that in the case at bar no definite ruling has been made and no Departmental policy of construction has been established in fact.

IV.

There Has Been No Congressional Construction of the Statute by a Reenactment Thereof After a Departmental Ruling.

The contention of the Government on this point is that the Departmental rulings, just reviewed herein, were extant at the time of the reenactment of the statute in 1921 and 1924, and that since the statute was reenacted without change Congress must be held to have adopted the Departmental construction.

The rule of law invoked by the Government is but a corollary of the rule, just discussed, that under certain circumstances Departmental rulings are given effect by the courts.

The corelative rules as stated in 2 Lewis' Sutherland, Stat. Const., 890 (2d Ed.) are as follows:

> "The Legislature is presumed to be cognizant of such construction [by those whose duty it is to execute a law], and after long continuance, without

> any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. *And where the statute is reenacted without change, the presumption is strong that the Legislature intended it to bear the same construction that had previously been given it.*"

It may be noted in passing that the rule as to reenactment of a statute, like its corollary, is a rule of construction, and is applicable only where construction is permissible or required.

An examination of the principal cases cited by the Government in the Court below, and the two cases cited in this Court, demonstrates that they do not rule the case at bar.

McDonald v. *Hovey,* 110 U. S. 619, 629, related to the effect of *judicial construction* of a statute prior to its re enactment.

In *New Haven R. R.* v. *Interstate Commerce Commission,* 200 U. S. 361, 401, the court refers to the rule as a familiar one applying to a "construction which has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration." It appeared from the case that the rulings in question were promulgated by the Interstate Commerce Commission in 1890 and 1891. The case was decided in 1905.

In *United States* v. *Philbrick,* 120 U. S. 52, 58, it appeared that the practice of the Secretary of the Navy complained of originated in 1814 and continued unabated until 1835, when the practice was forbidden by statute. The Act of 1835 was repealed in 1866. The practice was thereupon renewed and continued until 1871, when the enact

ment of a new statute terminated it. The court said that since the practice had "been frequently exercised prior to 1835, without objection by the legislative branch of the Government; and since that Act as well as the one in 1866 is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed, at this late day, to question the validity of the order of May 23, 1866."

The court also pointed out that the practice was specifically brought to the attention of Congress by a report transmitted to it by the President, by a subsequent report of the Secretary of the Navy, thereafter by a communication to the House Committee on Naval Affairs, and still later by a communication of the Fourth Auditor of the Treasury, and other reports.

The case of *United States* v. *Baruch*, 223 U. S. 191, involved an interpretation of the Tariff Act of 1890 which had been adhered to by the Customs officials up to and including the importation in question, which occurred in 1899. With such ruling extant Congress had in 1897 and two years prior to the importation upon which the question was raised, enacted a statute using the same terminology as appeared in the Act of 1890.

The case of *United States* v. *G. Falk & Bro.*, 204 U. S. 143, also involved the Tariff Act of 1890 and a construction thereof which was continuously followed down to the Tariff Act of 1897, when the provision in question was reenacted. The import duty to which objection was raised in the case arose upon imports after the enactment of the Tariff Act of 1897.

In *National Lead Co.* v. *United States,* 252 U. S. 140, the court said:

> ". . . when uncertainty or ambiguity, such as we have here, is found in a statute great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—especially where such construction has been long continued, as it was in this case for *almost forty years* before the petition was filed. . . . To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed" (pp. 145-146).

In *Latimer* v. *United States,* 223 U. S. 501, the Tariff Act of 1883 had been construed by the Supreme Court in 1894. The provisions of the statute so construed were again employed in the Tariff Act of 1897 and the issue of construction arose in the case in 1912.

United States v. *Cerecedo Hermanos y Ca.,* 209 U. S. 337, involved the effect of Treasury decisions construing the Tariff Act of 1875. The Tariff Act of 1897 contained substantially similar provisions. The question of construction arose in the case in 1907 and the rule was applied upon the doctrine of the reenactment of the statute without change after it "had previously received long continued executive construction."

In *Komada & Co.* v. *United States,* 215 U. S. 392, a tariff act had received executive construction prior to 1894 as evidenced by numerous Department decisions. The statutory provision appeared also in the Tariff Act of 1897. The importation out of which the litigation arose occurred in 1904, when the rule was applied.

Compare these cases with the case at bar. We do not have here any long established practice interpretation or construction under Departmental rulings. The rulings to which the Government would ascribe the force and effect of law, to the exclusion of jurisdiction of the courts over the matter, were rulings made in the proceedings and with respect to the particular tax before the court in this case.

While these rulings were in the process of litigation and before the courts had passed upon the issue raised as to the construction of Paragraph (3), Congress reenacted the Paragraph. The rulings themselves were inconsistent and irreconcilable. What construction could it be claimed that Congress adopted by reenacting the statute? Merely that the claimant was taxable? Or that she was taxable under one of the two sections and that Congress did not know which? Or did Congress merely reenact Paragraphs (3) and (4) in the 1921 Act, without knowing anything about the construction placed upon them in the case of the claimant?

The fact that the rulings, the payment of the tax, the protest, the litigation, and the Congressional action were practically contemporaneous, precludes the presumption, necessary to the rule, that the Legislature was cognizant of the Departmental construction.

In the cases cited by Government counsel the construction had been in vogue for periods ranging from seven years to fifty years and was either specifically brought to the attention of Congress or had continued so long as to justify the presumption that it had knowledge thereof. In the case at bar, we have only conflicting rulings immediately contested in the courts, and a reenactment of the statute while such rulings are in process of litigation.

Under such circumstances, no presumption can arise that the rulings were brought to the attention of Congress or that it adopted any one of them. The case is utterly devoid of the characteristic features of the cases in which the principle has been enunciated and applied, and, therefore, cannot be brought within the rule.

Respectfully submitted,

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